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No. A-105

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

FRANK ALBANO and JACQUELINE ALBANO,

Petitioners,

vs.

CRAIG CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Seventh Circuit Court of Appeals was correct in affirming the trial court's ruling that collateral estoppel should be applied in this cause based on the outcome of a different case wherein Petitioners were defendants?

TABLE OF CONTENTS

	Page
Prayer	1
Opinions Below	2
Statement of Jurisdiction . . .	3
Statement of the Case	4
Argument for Allowance of the Writ	9
Conclusion	24

Appendix

A. Order of Court of Appeals for the Seventh Circuit in Craig Corporation v. Frank Albano and Jacqueline Albano (84-1652), dated May 13, 1985.

B. Judgment of the Seventh Circuit Court of Appeals in Craig v. Albano.

C. Order of the Court of Appeals for the Seventh Circuit in Clarion Corporation v. Frank Albano and Jacqueline Albano (82-1027), dated December 13, 1982.

TABLE OF AUTHORITIES

	Page
Clairborne v. Hutchinson, 67 Ill. App.3d 374, 385, N.E.2d 29, 24 Ill. Dec. 262 (1978)	11, 23
Department of Transportation v. Shaw, 68 Ill.2d 342, 369 N.E.2d 884, 12 Ill. Dec. 177 (1977) . .	10, 23
International Refugee Organization v. Republic S.S. Corp., 189 F.2d 858 (4th Cir. 1951)	22
Montana v. United States, 440 U.S. 147, 99 S.Ct. 970 (1979) . . .	11
Siebach v. Pienta, 60 Ill.App.3d 645, 377 N.E.2d 393, 18 Ill.Dec. 240 (1978).	16
Spiller v. Continental Tube, 105 Ill.App.3d 790, 434 N.E.2d 850, 61 Ill. Dec. 495 (1982)	16
Stebbins v. Keystone Insurance Company, 481 F.2d 501 n.13 (D.C.Cir. 1973)	22
The People ex rel. Chicago and Eastern Railroad Company v. Fleming, 42 Ill.2d 231, 246 N.E.2d 275 (1969)	10, 24
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)	17

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PRAYER

The Petitioners, Frank Albano and Jacqueline Albano, respectfully pray that a Writ of Certiorari issue to review the judgment and order entered on May 13, 1985 by the United States Court of Appeals for the Seventh Circuit affirming the judgment

entered against Petitioners by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Seventh Circuit in Craig Corporation v. Frank Albano and Jacqueline Albano, unpublished and not to be cited per Circuit Rule 35, affirming the judgment entered against Petitioners by the trial court is attached hereto as Appendix A.

The Order of the United States Court of Appeals for the Seventh Circuit, unpublished and not to be cited per Circuit Rule 35, in the case of Clarion Corporation v. Frank Albano and Jacqueline Albano is attached hereto as Appendix C.

STATEMENT OF JURISDICTION

Petitioners, Frank Albano and Jacqueline Albano, appealed to the United States Court of Appeals for the Seventh Circuit the judgment entered against them by the United States District Court for the Northern District of Illinois, Eastern Division. The Court of Appeals for the Seventh Circuit affirmed that judgment.

On August 8, 1985, this Honorable Court entered an Order extending the time to and including October 10, 1985, for Petitioners to file a Petition for Writ of Certiorari. This petition for Writ of Certiorari was filed prior to October 10, 1985.

Jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1254(1) and Rule 17.1(a) of the Rules of this Court.

STATEMENT OF THE CASE

Craig Corporation (Craig) brought suit against Custom Car Stereo, Inc. (CCS), Custom Car Stereo Distributing, Inc. (CCSD), Custom Car Stereo of Oak Lawn, Inc. (CCSOL) and Frank Albano and Jacqueline Albano, individually, to collect $77,786.78 for automobile radio equipment delivered by Craig to CCSD. Suit was brought in the Northern District of Illinois, Eastern Division, on the basis of diversity of citizenship. (28 U.S.C. 1332)

In its complaint, Craig alleged that the corporate veils of CCS, CCSD and CCSOL should be pierced and the Albanos should be personally liable for the debt to Craig. According to Craig's complaint, the Albanos stripped the assets of the corporations which they operated as their alter egos.

Craig's suit against the Albanos was filed a few days after a jury returned a verdict against the individual defendants in the case of Clarion Corporation v. Albano (80 C 2703), which was previously pending against the Petitioners in the Northern District of Illinois, Eastern Division. The jury in Clarion decided to pierce the corporate veil and found the individual defendants liable for the obligation owed Clarion.

After the Seventh Circuit Court of Appeals affirmed Clarion v. Albano (82-1027) on December 13, 1982, the district judge in this case ruled that, in light of Clarion, the defendants were collaterally estopped from contesting personal liablity for the debt owed Craig. The trial court decided that the defendants, Petitioners herein, were therefore personally liable unless they

prove that Craig waived its right to assert its claim.

The evidence at the trial disclosed that Craig did business exclusively with CCS up to June, 1980, when Frank Albano formed CCSD. CCSD was formed by Frank Albano shortly after Clarion filed suit against CCS. When CCSD was formed, all inventory and all liabilities, including Craig's, were transferred from CCS to CCSD. The formation of CCSD in June, 1980, and the transfer of inventory and liabilities from CCS to CCSD were made known to Craig by the Albanos. The only liability which was not transferred to CCSD and which remained with CCS, was the debt owed Clarion. Craig was aware of the Clarion suit which was pending against the Albanos.

Thereafter, Craig did business exclusively with CCSD and the debt which

Craig sought to recover in this cause was incurred by CCSD after June, 1980.

Craig and CCSD did business together until mid-May, 1981 when Frank Albano sold his stock in CCS, CCSD and CCSOL to William Boris and William Caldwell who were employees of the corporations. The sale was for $60,000.00 in cash, Albano was to retain $100,000.00 worth of inventory and the new owners would be assuming the existing liabilities of the three corporations. This included the debt owed Craig at that time.

With respect to the sale of CCS, CCSD and CCSOL to Boris and Caldwell, Craig's regional sales manager testified at trial that he was unaware of the sale to Boris and Caldwell until after it occurred. However, the Albanos testified that the sale was announced at a meeting approximately one month before it

occurred, and, furthermore, documentary evidence presented at trial indicated that Craig may have been aware of that sale as early as February 4, 1981.

After the sale of the three corporations in May, 1981, the evidence disclosed that Craig looked to the new owners and the corporations for satisfaction of the Craig debt and, according to Craig representatives who testified at trial, the new owners agreed that it was their obligation. Demand by Craig for payment was never made of the Albanos on an individual basis.

The jury found that the Petitioners did not prove that Craig waived its right to collect and judgment was entered in favor of Craig in the amount of $85,141.03, which included interest and costs.

REASONS FOR GRANTING A WRIT

The Order of the Seventh Circuit of Appeals Affirming the Trial Court's Application of Collateral Estoppel Conflicts with Illinois Precedent Concerning Application of that Doctrine.

In a diversity action, state law must be examined to determine whether the trial court properly applied the doctrine of collateral estoppel.

The Illinois Supreme Court recently addressed this question by stating that, in order for the doctrine to be applied, it is absolutely necessary that there was a finding of a specific fact in the former judgment or record that was material and controlling in that case as well as material and controlling in the pending case. It must also conclusively appear that the specific fact was so in issue that it was necessarily determined by the court rendering the prior judgment which is now being interposed as a bar by reason

of estoppel. Estoppel should not be applied if there is any uncertainty as to whether more than one distinct issue of fact was present in the prior proceeding because that court may have rendered a decision upon one of the other issues of fact. Department of Transportation v. Shaw, 68 Ill.2d 342, 369 N.E.2d 884, 12 Ill.Dec. 177, 179 (1977); The People ex rel. Chicago and Eastern Railroad Company v. Fleming, 42 Ill.2d 231, 246 N.E.2d 275, 277 (1969).

Additionally, for collateral estoppel to apply, the issue decided in the prior adjudication must be identical with the one present in the current case. When the second case, as is the situation here, is upon a different cause of action, the judgment in the first suit operates as a bar only as to the point or question actually litigated and determined and not as to matters which might have been

litigated and determined. Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973 (1979); Clairborne v. Hutchinson, 67 Ill.App.3d 374, 385 N.E.2d 29, 24 Ill.Dec. 262, 265 (1978).

By reviewing the material facts and issues presented in the Clarion litigation, it appears that the reviewing court was incorrect in affirming the trial court's application of collateral estoppel in this case. According to the Seventh Circuit Court of Appeals in Clarion, "... the only question to go to the jury was whether to pierce the corporate veil of CCS and thereby hold the Albanos liable for the [Clarion] debt." (App., C 2) There is nothing in that opinion to suggest that the Clarion jury was ever requested to consider or decide whether the corporate veil of CCSD should be pierced with respect to the obligation owed Craig.

The main issue in Clarion was the Albanos' personal liability for the debts of CCS. The controling issue in this case was the personal liability of the Albanos for the debt of CCSD, a totally different corporation with which the plaintiff in this case did business. The Clarion jury was asked to consider the financial condition of CCS and whether the conduct of Frank Albano in transferring assets left CCS insolvent and unable to pay the Clarion obligation. That jury was not asked to consider the financial condition of CCSD and whether the sale of CCSD stock to Boris and Caldwell was conduct designed, as in Clarion, to leave that corporation insolvent and unable to pay the Craig obligation.

Clarion, as reflected in the Order of the Seventh Circuit in that case, (App. C), dealt specifically with asset-

stripping of CCS which was the corporation that did business with Clarion. CCS asset stripping was a specific fact which was material in piercing the corporate veil in that case.

CCSD asset stripping was not an issue in the Clarion litigation. Also, there is nothing to suggest that a consideration of that issue was necessary in order for the Clarion jury to render its decision so as to justify application of collateral estoppel to this case.

In addition to different issues raised in the two cases, the material facts of both cases are totally different. Clarion and Craig involve separate and distinct obligations owed to different suppliers by separate and distinct corporations. Clarion's debt was with CCS which was incurred prior to the formation of CCSD. Craig's debt and

business dealings were strictly with CCSD and were incurred after June, 1980 when CCSD was formed.

The facts as set forth in the reviewing court's Order in Clarion indicate that CCS assets were transferred to CCSD leaving CCS insolvent and unable to satisfy the Clarion obligation. In this case, there is no evidence that CCSD was left insolvent at the time it was sold by Frank Albano. The transfer of CCS assets to CCSD in June, 1980 was not known to Clarion. On the other hand, testimony in this case disclosed that the sale of CCSD stock to Boris and Caldwell in mid-May, 1981, was made known to Craig before it occurred. Clarion did not look to CCS for satisfaction of it's debt after the transfer of assets to CCSD but, instead, it looked to the individual defendants for satisfaction of that

obligation. Craig, on the other hand, continued to look to CCSD for payment. The Craig liability was assumed by the new owners according to all of the testimony presented whereas, in Clarion, the Clarion liability remained with an insolvent CCS corporation.

The facts of Clarion further indicate quite clearly that the transfer of assets from CCS to CCSD was intended to avoid the obligation owed to Clarion by CCS. In this case, however, there is no evidence to support a theory that Frank Albano was attempting to avoid the Craig obligation when it sold CCSD to Boris and Caldwell. On the contrary, the facts in this case disclosed that, prior to the sale of CCSD, the debt owed Craig by CCSD was reduced from approximately $200,000.00 to $77,000.00 because Frank Albano wanted to reduce that liability pending sale of the business.

In addition to different issues, it is quite obvious that the two cases are based on materially different and controlling facts which also precludes application of the principle of collateral estoppel. In order for the judgment in Clarion to have been properly applied in this case, it must be clearly apparent that the material and controlling facts in this case, which are set forth above, were specifically and necessarily decided as material and controlling facts in Clarion. Spiller v. Continental Tube, 105 Ill. App.3d 790, 434 N.E.2d 850, 61 Ill. Dec. 495, 499 (1982); Siebach v. Pienta, 60 Ill.App.3d 645, 377 N.E.2d 393, 18 Ill. Dec. 240,243 (1978). Furthermore, the offensive use of collateral estoppel, as was done in this case, requires a clear showing that the Albanos had a full, fair and complete opportunity in the Clarion

action to present the material and controlling facts with respect to the obligation owed Craig. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979).

There is nothing to suggest that these material and controlling facts were, of necessity, decided in the Clarion litigation. Craig, having full knowledge of the pending Clarion litigation, waited for the decision in that case before filing this case. As a result, the Albanos did not have a complete opportunity in Clarion to present the relevant facts concerning the Craig debt. Offensive use of collateral estoppel, therefore, should not have been utilized by the trial court to pierce the corporate veil of CCSD and impose personal liability on the part of the Albanos. Parklane Hosiery Co. v. Shore, supra.

Recognizing the fact that asset stripping of CCSD was not the central issue in Clarion and confronted with material facts in this case which were totally different from Clarion, the Court of Appeals in this case affirmed the lower court's application of collateral estoppel by holding that the Clarion jury actually decided that case on the basis that the defendants operated the corporations as their alter egos. (App., A. 8-9, 15-16, 18) According to the Court, this was the central issue in this case and in Clarion thus justifying application of collateral estoppel.

Petitioners respectfully submit that the Seventh Circuit's determination that Clarion was decided on an alter ego theory of personal liability is speculation and without any basis. A review of that

Court's Clarion Order clearly shows that the Court spoke entirely on the issue of asset stripping of CCS. It took great care in pointing out all of the facts which supported the jury's decision to pierce the CCS corporate veil because CCS was stripped of assets by Frank Albano. That Order even quoted excerpts of Frank Albano's testimony in Clarion as evidence that CCS was left insolvent by Frank Albano and could not pay its obligations. (App., C 13)

Furthermore, it is difficult to understand how the central issue in Clarion was anything but asset stripping of CCS in light of the following excerpts from that Order: (1) "... the only question to go to the jury was whether to pierce the corporate veil of CCS and thereby hold the Albanos liable for the debt." (App., C 2); (2) "The

evidence at trial revealed a classic example of asset-stripping by the Albanos and circumstances which clearly warranted the piercing of the corporate veil." (App., C 11); and (3) "But this case was based on a monetary obligation owed to the plaintiff by CCS, and after the transfer of CCS's assets and the takeover of it's retail operations it is clear that CCS was unable to satisfy the debt." (App., C 14)

Additionally, it is equally difficult to accept the conclusion that the corporate veil in Clarion was pierced on an alter ego theory when the Seventh Circuit's Order in Clarion states: "The appellants' concern that, ..., the jury could have based its verdict on a finding that the corporate defendants failed to maintain adequate records or that the different corporations were treated as

different parts of one operation seems very unlikely in view of the nature of the evidence presented in this case." (App., C 15)

Even if one were to assume that the central issue in this case was whether to pierce the corporate veil because the Albanos operated CCSD as their alter ego, this issue is not identical to the central issue in Clarion as demonstrated above.

The Petitioners submit that it is highly unlikely that resolution in Clarion of the issue of whether the corporations were operated as alter egos was essential to a final judgment in that case in light of the evidence which centered solely around the stripping of assets of CCS and in light of the Seventh Circuit's determination in Clarion that it was very unlikely that the jury based it's verdict on an alter ego theory of personal

liability. Furthermore, it is equally unlikely that the central issue in Clarion was whether CCSD was operated by the Albanos as their alter ego when the management of CCS, not CCSD, was the center of controversy in that case.

Even if the decision in Clarion to pierce the corporate veil was based on both grounds of asset stripping and on the alter ego theory, only those issues expressly considered by the Appellate Court in that case can be used in a subsequent proceeding as the basis for a plea of collateral estoppel. Stebbins v. Keystone Insurance Company, 481 F.2d 501, 507 n.13 (D.C.Cir. 1973); International Refugee Organization v. Republic S.S. Corp., 189 F.2d 858, 862 (4th Cir. 1951). Because the alter ego theory was not considered by the Appellate Court in deciding Clarion, it would have been error

for the trial court in this case to have applied collateral estoppel to pierce the corporate veil on that theory. If that theory was in fact used by the trial court in this case to pierce the corporate veil, the Seventh Circuit's affirmance of the trial court is also erroneous and should be reversed.

The decision of the Seventh Circuit in this case conflicts with established Illinois precedent which requires that a judgment in the first suit can operate as a bar in a subsequent action only as to a point or question actually litigated and determined and not as to matters which might have been litigated or determined. Department of Transportation v. Shaw, supra; Clairborne v. Hutchinson, supra.

Because it does not conclusively appear that the alter ego theory of individual liability was material and

controlling in the jury's decision in Clarion, the Seventh Circuit should not have relied upon such a theory to affirm a trial court's use of collateral estoppel to impose individual liability in this case. The People ex rel. Chicago and Eastern Illinois Railroad Company v. Fleming, supra. The Court's reasoning that the Albanos would have been found liable in Clarion if the alter ego theory had been presented to the jury (App., A. 18) is contrary to precedent which dictates the circumstances when collateral estoppel can properly be applied.

CONCLUSION

The issues and material facts of Clarion are totally different from the issues and material facts present in this case. Collateral estoppel should not have been applied and the Seventh Circuit Court

of Appeals erred in affirming the lower court's ruling in that regard.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604
Argued February 13, 1985

May 13, 1985

Before

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. LUTHER M. SWYGERT, Senior Circuit Judge

NO. 84-1652

CRAIG CORPORATION,	)	Appeal from the
	)	United States
Plaintiff-Appellee,	)	District Court for
	)	the Northern
vs.	)	District of
	)	Illinois, Eastern
FRANK ALBANO and	)	Division.
JACQUELINE ALBANO,	)	No. 81 C 5087
	)	Judge William T.
Defendants-Appellants	)	Hart

O R D E R

In this diversity action, plaintiff, Craig Corporation ("Craig") sued defendants Frank and Jacqueline Albano, along with Custom Car Stereo, Inc. ("CCSI"), Custom Car Distributing Co. ("CCSD"), and Custom Car Stereo of Oak

Lawn ("CCSOL"), to collect $77,786.78 for goods delivered by Craig to CCSD.[1] The Albanos, sole shareholders, directors, and officers of the three corporations were alleged to have personal liability for any debts of those corporations because they had transferred the assets of CCSI to CCSD and CCSOL for inadequate consideration, and because they had operated the three corporations as their alter egos. The district judge held that the Albanos were collaterally estopped, by a judgment entered against the Albanos in a previous divesity action, Clarion Corp. of America v. Albano, No. 82-1027 (7th Cir. Dec. 13, 1982)(unpublished order), from contesting their personal liability for the debts of

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[1] In an exhibit attached to its complaint, Craig identified the debtor as CCSI. Nonetheless, the actual invoices show that CCSD incurred the debts that Craig now seeks to recover.

any of the three corporations. The only issue presented to the jury, then, was the Albanos' affirmative defense that Craig had waived its right to proceed against them. The jury found that Craig had not waived its right. Judgment was entered against the Albanos for $85,141.03 plus interest, representing the face amount of the debt, $77,786.78, plus interest from the date on which a default judgment had been entered against the three corporate defendants. The Albanos now appeal, and we affirm.

The Albanos' primary contention on appeal is that the district judge erred in holding that they were collaterally estopped from contesting their personal liability. Before the doctrine of collateral estoppel can be invoked, the party seeking to use it must show that: (1) the issue in the current action is identical one in the first action; (2)

the issue was litigated in the first action; (3) the resolution of that issue was essential to a final judgment in the first action; and (4) the party against whom collateral estoppel is sought to be invoked had a full and fair opportunity to litigate that issue in the first action. Whitley v. Seibel, 676 F.2d 245, 248 (7th Cir. 1982); Continental Can Co., U.S.A. v. Marshall, 603 F.2d 590, 594-95 (7th Cir. 1979); Department of Transporation v. Shaw, 68 Ill.2d 342, 369 N.E.2d 884 (1977).

The defendants argue that none of these requirements have been satisfied.[2] They contend that in the instant case the issue is whether the corporate veil of CCSD should be pierced to hold the

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[2] The Albanos contend that they did not have a full and fair opportunity in Clarion to litigate the central issue in this case. Yet they present no further analysis other than a conclusory statement to support their argument.

officers and shareholders of that corporation liable for the debts owing Craig. Thus, according to the defendants, the critical question in this case was whether Frank Albano sold CCSD stock to third parties on May 14, 1981, to avoid paying its debts to Craig by leaving CCSD insolvent. In Clarion, on the other hand, the only issue essential to the judgment that was actually litigated and decided was whether the defendants were personally liable for the debts of CCSI because Frank Albano had stripped CCSI of all of its assets and liabilities except those belonging to the plaintiff in that case, Clarion. According to the defendants, the jury in Clarion was only asked to consider the financial condition of CCSI and not CCSD, and whether the conduct of Frank Albano in transferring assets left CCSI insolvent and unable to pay the Clarion obligation.

Defendants support their argument by referring to this Court's unpublished decision in Clarion, No. 82-1027 (Dec. 13, 1982), in which we stated that "the only question to go to the jury was whether to pierce the corporate veil of [CCSI] and thereby hold the Albanos liable for the debt." Id. at 1. Defendants point to several factual differences between this case and Clarion as further support for this argument. They state that in Clarion, CCSI owed the debts and those debts were incurred in 1979; in this case, CCSD owed the debts and the debts were incurred from December 1980 until April 1981. The stripping of CCSI's assets took place in June 1980, shortly after Clarion had commenced suit against CCSI for the unpaid debts, but long before Craig's debts were incurred by CCSD and before Craig commenced suit against CCSI and CCSD for breach of contract.

We hold that the district judge properly determined that the Albanos were collaterally estopped by the judgment in Clarion from contesting their liability for the debts of CCSD. The fallacious assumption underlying the defendants' argument is that corporate officers can be personally liable for the debts of a corporation only if they strip the assets of the corporation thus leaving the corporation unable to pay its debts. But Illinois law, the applicable law in this diversity action, is clear that an owner, officer, or director of a corporation who dominates and completely controls that corporation may be held liable when he himself so disregards corporate formalities that a creditor is entitled to look to him for payment because adherence to the fiction of a separate corporate existence would sanction or promote an injustice. See, e.g., Allied Chemical

Corp. v. Randall, 321 F.2d 320, 323 (7th Cir. 1963): People ex rel. Scott v. Pintozzi, 50 Ill.2d 115, 128-29, 277 N.E.2d 844, 851-52 (1971); Himmelstein v. Valenti Development Corp., 103 Ill.App.3d 911, 195-16, 431 N.E.2d 1299, 1302-03 (1st Dist. 1982); Stap v. Chicago Aces Tennis Team, Inc, 63 Ill.App.3d 23, 27-28, 379 N.E.2d 1298, 1301-02 (1st Dist. 1978), and cases cited therein; Jaffey v. Chicago Warehouse Lumber Co., 4 Ill.App.2d 415, 423-26, 124 N.E.2d 618, 622-23 (1st Dist. 1954)(involving facts very similar to those in case at bar). See also Shamrock Oil & Gas Co. v. Ethridge, 159 F.Supp. 693, 696-97 (D. Col. 1958). See generally Annot., 46 A.L.R. 3d 428 (1972) and (Supp. 1984). In our view, in Clarion the Albanos were held liable for CCSI's debts not solely because of the fraudulent transfer of assets in June and July 1980, but also because they

had managed and comingled the assets and liabilities of the three corporations in such a manner that any creditor could look to the Albanos or any one of the corporations for payment of an outstanding debt. This is precisely the central issue in this case, and hence collateral estoppel properly applies.

Our holding is supported by an examination of the pleadings, evidence, and jury instructions in Clarion. See Williams v. Liberty, 461 F.2d 325, 327 (7th Cir. 1972) (when the prior verdict does not specify the issues actually determined in that action, a court must look to the pleadings, evidence, and jury instructions of the prior action to determine which issues were in fact decided). In Clarion the plaintiff-creditor alleged that CCSI was liable on a breach of contract theory, and that each

of the three corporate defendants and the individual defendants were liable on the theory that the individual defendants had treated the corporations as mere instrumentalities, had comingled the assets of the three corporations (thereby treating them as a single entity), and had diverted funds from the three corporations specifically to avoid liability. Under the second theory, plaintiff argued that CCSD and CCSOL had been organized solely to avoid the debts of CCSI and that the corporate defendants and the individual defendants were part of a single enterprise to which creditors could look for the payment of its debts. In final argument in Clarion, plaintiffs repeatedly referred to this theory of liability. In the instant case, the plaintiff has set forth the same theories of liability.

In addition, in Clarion, in seeking to establish the personal liability of the Albanos for the debt owed to it, Clarion introduced the following evidence. Shortly after Clarion commenced suit against CCSI on June 30, 1980, Frank Albano incorporated CCSD and authorized the transfer of most of CCSI's assets to CCSD. The initial capitalization of CCSD was $1,000, the minimum required by statute. Frank Albano was the sole shareholder and officer of CCSI; Jacqueline and Frank Albano were the sole directors of CCSI. Frank Albano was the sole director, shareholder, president, and treasurer of CCSD. Jacqueline Albano was its vice-president and secretary. CCSI and CCSD were both in the business of selling and installing car stereos and both businesses purchased from the same suppliers. On July 8, 1980, Frank Albano

incorporated CCSOL to take over the operations of CCSI. Frank was the sole officer and shareholder of CCSOL; Jacqueline and Frank were its sole directors. Frank Albano controlled six corporations, all of which were involved in the same type of business. All three corporate defendants shared the same office space; CCSD paid the rent for CCSI and CCSOL and it paid some of CCSI's debts and bonuses to employees of CCSI. All three corporations discharged one another's debts. Each of the three corporations paid substantial dividends to Frank Albano, and Frank Albano's salary at CCSI increased from $12,000 to $98,000 over a four-year period. Few corporate meetings were held and few corporate resolutions were adopted regarding the salary and dividends to be paid to Frank Albano. In early 1981, with Frank

Albano's authorization, CCSD made a low interest $25,000 loan to Frank Albano, without requiring any collateral. Frank used the money to purchase the property on which the three corporations were located and he charged them rent. The loan was never repaid and was ultimately forgiven when Frank Albano sold the three corporations in May 1981. As consideration for the sale in May 1981, Frank Albano was given $100,000 in inventory from CCSD, forgiveness of the $25,000 loan, and a $30,000 promissory note. No consideration was paid to CCSD. Frank Albano subsequently opened another store at the same location, where he operated a business similar to CCSD and used the same inventory that had been given to him by CCSD. Throughout this period, Jacqueline Albano, in her capacity as a corporate official, authorized and participated in

many "questionable" corporate transactions and failed to follow corporate formalities. Under Illinois law, these facts demonstrate a "classic case" of alter ego. See Gallagher v. Reconco Builders, Inc., 91 Ill.App.3d 999, 1005, 415 N.E.2d 564 (1st Dist. 1980)(factors to be considered in deciding if individual is corporation's alter ego are undercapitalization of corporation, commingling of assets, failure to maintain adequate records, few corporate meetings or resolutions, siphoning off of corporate funds by dominant shareholder, and failure to observe corporate formalities). See also Fletcher Cyc Corp. §41.30 (perm ed. 1983). These are the same facts that Craig would have introduced in this action to prove that the Albanos should be liable for the debts of any of the three corporations.

Finally, in Clarion the district judge instructed the jury that it could find the Albanos liable if there "exist[ed] such a unity of interest and ownership of the corporate defendants and individual defendants that the separate personality of the . . . corporation(s) and/or the individual(s) did not longer exist . . . and . . . circumstances exist which would allow the adherence to the fiction of separate corporate existence to sanction a fraud or promote justice." Clarion at Appendix A. Moreover, in their brief to the court in Clarion, the Albanos admitted that the issue of disregarding the corporate identity of all three corporations was before the jury.

The pleadings, facts presented during the trial of the prior case, and the jury instructions demonstrate that the issue

presented, litigated, and decided in Clarion was whether the corporate officers had treated all three corporations as merely the alter egos of each other so that a creditor could look to anyone of them for repayment of a debt. If Clarion meant only to pierce the corporate veil of CCSI, it would have sued only CCSI and the individual defendants, and it would have presented evidence of the asset-strripping that took place in June and July 1980. The remainder of the evidence introduced regarding the various subsequent improprieties of the Albanos occurring after July 1980 would have been irrelevant. In addition, had the jury found liability solely on the basis of the asset-stripping in June and July 1980, it is highly unlikely, if not impossible, that the jury would have found against Jacqueline Albano. As the Albanos point

out, in June and July, Jacqueline Albano was merely a director of CCSI; Frank Albano was solely responsible for the incorporation of CCSD and CCSOL and the transfer of CCSI's assets to those corporations. Illinois law provides that a corporate officer and director is not individually liable for the corporation's debts unless he has actively participated in the fraudulent acts designed to avoid the debt. Laff v. Chapman Performance Products, Inc., 63 Ill.App.3d 297, 311, 379 N.E.2d 773, 784 (1st Dist. 1978); Sears v. Weissman, 6 Ill.App.2d 827, 832, 286 N.E.2d 777, 782 (1st Dist. 1972). Thus the jury could not have found her liable solely on the basis of the asset-stripping in June 1980. Indeed the only incriminating evidence against her concerned her involvement in the mismanagement of the day-to-day affairs of

the three corporations after July 1980, demonstrating that the jury did find that the Albanos were the alter egos of all three corporate defendants. In addition, if the jury had found the Albanos liable only on the theory of the fraudulent transfer in June 1980, it would not have found the other two corporate defendants CCSD and CCSOL liable. In view of the overwhelming evidence presented at the Clarion trial, it is evident, had the issue been presented to it,[3] the jury would have found them liable.

Finally, in Clarion this Court rejected the Albanos' claim that the jury instruction discussed, supra at 5, was eroneous because the jury might have found them liable on the "alter ego" theory

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[3] The three corporate defendants defaulted before trial and hence the issue of their liability was not presented to the jury.

merely because "the corporate defendants failed to maintain adequate records or ... [because] the different corporations were treated as different parts of one operation," Id. at 6-7. We rejected this claim because of the nature of the evidence presented, Id. at 7--i.e., the evidence presented with respect to this theory was overwhelming. In Clarion, we detailed the evidence discussed, supra at 4-5, thus implicitly recognizing the broader reach of the jury's decision. Contrary to defendants' assertions, then, this Court believed that the jury had found the Albanos liable on the alter ego theory. Our decision in Clarion did state that the only issue that went to the jury was whether the corporate veil of CCSI should be pierced. Nonetheless, that statement is not dispositive of whether the issue of the Albanos' liability for

the debts of CCSD was actually litigated and decided in the prior trial. Kurek v. Pleasure Driveway & Park Dist. of Peoria, 583 F.2d 378, 380 (7th Cir. 1978). Rather, "it is the judgment, properly construed in the light of pertinent facts, that creates the potential for collateral estoppel ..." Id.

Defendants are correct that in Clarion the jury could have found Frank Albano liable for CCSI's debts solely because of the fraudulent transfer of assets in June and July 1980. See, e.g., Central States, Southeast & Southwest Areas Pension Fund v. Gaylur Products, Inc., 66 Ill.App.3d 709, 715, 384 N.E.2d 123, 127-28 (1st Dist. 1978); Loy v. Booth, 16 Ill.App.3d 1077, 307 N.E.2d 414 (2d Dist. 1974); see generally Annot., 46 A.L.R. 3d 428, 441-443 (1972) and (Supp. 1984). But this evidence does not account

for the verdict against Jacqueline Albano. In addition, accepting the Albanos' view of which issues were actually determined and litigated in Clarion would require us to engage in a parsing of the jury's verdict that is unwarranted in light of the evidence presented at trial, the pleadings, the theories of liability presented, the jury instructions, and our Clarion opinion. Thus we hold that the district judge correctly prohibited the Albanos from relitigating their liability for the debts of any of the three corporations.[4]

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[4]Contrary to defendants' assertions, the record does not show that the district judge based his decision solely on our Clarion opinion. We will not presume that the district judge failed to read Craig's motion for summary judgment and the accompanying exhibits or that he otherwise ignored the pleadings, evidence presented, and the jury instructions in Clarion, solely because he did not specifically articulate that he had read and considered those documents and the evidence.

II.

After most of the evidence had been presented, including, as the defendants concede, almost all of the evidence that they intended to present on their defense of equitable estoppel,[5] the defendants asked the district judge to instruct the jury on equitable estoppel. The district judge denied the request on the grounds that the Albanos' proposed jury instructions on this issue were incorrect and that the Albanos' evidence was

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[5]The additional evidence that defendants unsuccessfully attempted to introduce was Frank Albano's testimony that he had relied on plainiff's failure to object to the sale of CCSD on May 14, 1981, in deciding whether or not to proceed with the sale.

insufficient as a matter of law to establish that defense. [6]

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[6]The defendants argue that the district judge refused to instruct the jury on this issue and to permit the amendment solely because the Albanos' answer only asserted the affirmative defense of waiver. The record, however, reveals that the district judge did not base his decision on this narrow ground. Thus Foman v. Davis, 371 U.S. 178 (1962), in which the Supreme Court held that "[o]utright refusal to grant leave without any justifying reason appearing for the denial is . . . [an abuse of discretion]," id. at 182, in inapposite to this case. Furthermore, the cases the defendants cite in support of their position all involved amendments requested pursuant to Fed.R. Civ.P. 15(a) and that provision's liberal policy in favor of permitting amendments. The instant case arises under Fed.R. Civ. P. 15(b) which has a different standard to govern amendments. See infra note 7.

Finally, even if the district judge had refused to permit the amendment on the ground that this defense was not presented in the pleadings as they stood before trial, we probably would not have found this to be an abuse of discretion. The district judge's pretrial order dated November 1, 1983 did not, as the defendants claimed at trial, include any reference to defenses other than waiver. Because trial did not take place until February 6, 1984, three-and-one-half months later, the defendants had ample time in which to request a pretrial amendment to the peadings. See also Smith v. Rowe, No. 83-3099, slip. op. at 9 (7th Cir. April 26, 1985); Fed.R.Civ.P. 16.

Defendants recognize that a district judge's refusal to permit amendment is governed by the "abuse of discretion" standard. See Foman v. Davis, 371, U.S. 178, 182 (1962). But they argue that the district judge's refusal here was an abuse of discretion beauase the plaintiff would not have been unfairly surprised since, under Illinois law, the defenses of estoppel and waiver are nearly identical, and since plaintiff was aware of all of the evidence that defendants intended to introduce in support of the estoppel defense.

The district judge acted reasonably in denying the defendants' request. In Illinois

> [t]he doctrine of equitable estoppel is "the effect of the voluntary conduct of a party whereby he is precluded from asserting his rights which might otherwise have existed against another party who has relied in good faith upon such

> conduct and has been led thereby to change his position for the worse . . . [citations omitted]." The party claiming the estoppel must have relied upon the acts or representations of the other and have no knowledge or convenient means of knowing the true facts.

Rockford Life Ins. Co. v. Department of Revenue, 128 App.3d 302 304-05, 470 N.E.2d 596, 598 (2d Dist. 1984). Defendants' proposed instructions did not even come close to stating this as the law of equitable estoppel. The evidence presented by defendants did not establish that plaintiff did anything to preclude its suing defendants on an alter ego theory. Defendants, not the plaintiff, knew the true facts and hence defendants' misrepresentations to plaintiff cannot estop plaintiff from pursuing its rights. Moreover, plaintiff's failure to object to the sale or to inform defendants that it would not pursue them is not the type of

"voluntary conduct" that can estop plaintiffs. See Bodine v. Bodine, 127 Ill App. 3d 492, 495, 468 N.E.2d 1004, 1006 (3rd Dist. 1984). Finally, it is not clear that defendants had changed its position for the worse when it relied on plaintiff's failure to object to the sale of CCSD.[7] Even had the defendants not

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[7]We note that the defendants did not make an offer of proof after plaintiff's objection to Frank Albano's reliance testimony. It was not until after defendants had presented all of their evidence and the trial had almost concluded that defendants moved to amend the pleadings. We believe that the interjection of this issue shortly before the trial was to conclude and before the case was to go to the jury would have been unfair to the plaintiff because the plaintiff would have had no opportunity for pretrial discovery or adequate cross-examination of defendants' witnesses on the reliance issue. Thus, the district judge properly could have (and may have) refused the amendment because it would have "prejudice[d] . . . [the plaintiff] in maintaining his action. . . . " Fed.R.Civ.P. 15(b). Compare Smith, No. 83-3099, slip op. at 9-11.

sold the business on May 14, 1981, they would still have been personally liable for CCSD's debts because of the manner in which they had managed the three corporations.

III

Defendants next contend that the jury's verdict that Craig had not waived its right to proceed against the Albanos for CCSD's debts is against the manifest weight of the evidence. The district judge denied defendants' motion for a new trial on this ground, and we note that a "trial judge's denial of a new trial on this ground can only be overturned if it constituted an abuse of discretion." Christmas v. Sanders, No. 83-3230 slip op. at 8 (7th Cir. April 12, 1985). The district judge's denial in the instant case was not an abuse of discretion.

To establish this affirmative defense, the Albanos were required to prove (1) the existence, at the time of the alleged waiver, of a right that Craig could have waived; (2) Craig's actual or constructive knowledge of this right; and (3) Craig's intentional relinquishment of this right. Shearson Hayden Stone, Inc. v. Leach, 583 F.2d 367, 370 (7th Cir. 1978); Perlman v. First National Bank of Chicago, 15 Ill. App.3d 784, 795, 305 N.E.2d 236, 245 (1st Dist. 1973). The Albanos submitted the following evidence on the issue of whether Craig waived its right to proceed against them personally. Despite Frank Albano's refusal to sign a personal guaranty in favor of Craig, Craig elected to continue doing business with CCSD. In July 1980, by a notice sent to all creditors, Craig became aware of the transfer of CCSI's assets to CCSD.

Although Craig's regional credit manager objected to the transfer, Craig continued to sell to CCSD. Albano assured Craig that CCSI's debt to Craig would be assumed by CCSD, and Craig continued to do business with CCSD thereafter. Craig knew the purchasers of CCSD's assets before May 14, 1981, and told them that Craig would not supply them until CCSI's and CCSD's debts to Craig were paid in full. It changed the name of the account to reflect the new corporations, and it credited that account to reflect certain promotional expenses. Craig did not object to the sale and it looked to the new owners of CCSI after May 14, 1981, for repayment. Craig, however, has never attempted to collect against the new owners. Craig also never advised the Albanos that it would look to them to repay the debt.

The jury, and the district judge, correctly decided that these facts did not establish waiver. To waive its right to proceed individually against the Albanos, Craig must have known that the Albanos mismanaged the three corporations. Craig's acts that the Albanos claim constitute waiver show precisely Craig's lack of knowledge of this crucial fact. Craig's response to the transfer of CCSI's assets to CCSD and the sale of CCSD's stock establishes that Craig viewed the transactions as legitimate. Based on Craig's lack of knowledge of the Albanos' mismanagement, it had no reason to object to either transaction or to inform the Albanos that it would hold them personally liable. This is particulary true given that, even after Craig became aware of the Clarion litigation, the Albanos repeatedly told Craig that the three corporations had

not been mismanaged. The Albanos cannot be absolved from wrongdoing by what appears in hindsight to have been Craig's bad business judgment in trusting the Albanos and continuing to do business with them.

Even if some of the evidence suggested that Craig knew that there was a possibility that it would have to proceed against the Albanos, the jury could easily have concluded that Craig's mere failure to object to the sale or to inform the Albanos that it would look to them for repayment did not constitute the voluntary relinquishment of a right. Craig had no affirmative duty to tell the Albanos that it intended to pursue them. In addition, Craig may have been waiting to see if the corporations would repay the debt before looking to the Albanos. The jury's

verdict was not against the manifest weight of the evidence.

IV

Defendants' final argument in support of reversal is equally without merit. Before trial, the district judge instructed the parties not to elicit any testimony regarding the Clarion litigation. The Albanos contend that, to their substantial prejudice, the plaintiff violated this ruling. In particular, on cross-examination, Craig asked Frank Albano if he had spoken with Craig's employees about the Clarion litigation and the resolution of that case, and if CCSI was solvent when CCSD was formed. Craig also asked Jacqueline Albano if there was any reason why Craig should suspect any wrongdoing by the defendants. Finally, Craig argued to the jury that the

defendants were guilty of wrongdoing and that the defendants did not tell the jury why they were collaterally estopped from contesting liabilty for the debt.

These few isolated statements do not warrant reversal. The district judge specifically permitted several of the comments because they were made in response to direct testimony given by Frank Albano. In addition, the district judge sustained objections to the other comments but recognized plaintiff's difficulty in defending against the waiver defense if it could not show that the Albanos consistently had denied any personal wrongdoing. Finally, these comments, although perhaps improper, were not substantially prejudicial because they did not succeed in eliciting any facts from Clarion and even without these comments the jury was likely to infer,

from the fact that the defendants could not contest their liabilty, that defendants had somehow acted improperly.

The judgment of the district court is affirmed.

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

May 13, 1985

Before

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. LUTHER M. SWYGERT, Senior Circuit Judge

CRAIG CORPORATION,	)	Appeal from the
	)	United States
Plaintiff-Appellee,	)	District Court for
	)	the Northern
vs.	)	District of
	)	Illinois, Eastern
FRANK ALBANO and	)	Division.
JACQUELINE ALBANO,	)	No. 81 C 5087
	)	Judge William T.
Defendants-Appellants	)	Hart

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that

the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

(Argued September 20, 1982)

December 13, 1982

Before

Hon. Harlington Wood, Jr., Circuit Judge

Hon. Luther M. Swygert, Senior Circuit Judge

Hon. William J. Campbell, Senior District Judge*

CLARION CORPORATIONS OF AMERICA, a California corporation,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Plaintiff-Appellee,	)	
NO. 82-1027 v.	)	No. 80 C. 2703
FRANK ALBANO and JACQUELINE ALBANO,	)	Nicholas J. Bua Judge
Defendants-Appellants.	)	

O R D E R

Defendants Frank and Jacqueline Albano appeal from a judgment entered

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* The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

against them after a jury trial.

Plaintiff Clarion Corporation brought this suit claiming an outstanding debt of $62,242.51 for goods sold and delivered to a corporation named Custom Car Stereo, Inc. (CCS). Subsequent to the filng of the complaint, the plaintiff added as defendants certain other corporations and the two appellants. All of the corporate defendants eventually had defaults entered against them. At the time of the trial the existence of the debt was no longer in issue, and the only question to go to the jury was whether to pierce the corporate veil of CCS and thereby hold the Albanos liable for the debt. The jury answered the question in the affirmative, returning a verdict for the plaintiff in the amount of $46,242.62.[sic] Defendants appeal,

challenging the sufficiency of the evidence and the propriety of the jury instructions on piercing the corporate veil.

For the purposes of this order, the facts can be briefly stated. CCS was incorporated in September of 1976 and was engaged in the business of selling and installing automobile sound equipment. Frank Albano was the president and chairman of the board of CCS and Jacqueline Albano wss the secretary and vice president. In late 1979 a dispute arose between the plaintiff and CCS. Clarion claimed that money was due for goods delivered and CCS contended that it had not received appropriate refunds for defective goods it had received. On May 28, 1980, Clarion filed its complaint in this cause. CCS filed its answer and counterclaim on June 26, 1980. Four days

later, Custom Car Stereo Distributing Company of Illinois (CCSDI) was incorporated by Frank Albano and the inventory of CCS was transferred to it. However, the Clarion inventory and the oustanding debt were not transferred to CCSDI. Various corporations, including Custom Car Stereo of Oak Lawn (CCSO), were created to take over the retail operations of CCS and CCSDI acted as the distributor for them. Upon learning of these developments, Clarion added CCSDI and CCSO as defendants as well as the Albanos. A few months prior to trial Frank Albano sold CCSDI and the related corporations. As part of that transaction, the inventory of CCSDI was transferred to a new corporation called Dashboard, which operated the same type of business as CCSO at the identical location. (Dashboard was not named as a defendant in this suit.)

As noted previously, the corporate defendants defaulted and at the trial the jury found the Albanos liable for the debt of CCS.

Appellants contend that jury instruction 19[1] submitted by the plaintiff, inaccurately presented the law on the issue of piercing the corporate veil. The appellee contends, however, that this alleged error is not properly before this court because the defendants failed to object to the instruction at trial, citing, inter alia, Fed.Rule of Civ.Proc. 51. At the conference on jury instructions, the following colloquy took place:

> MR. PARISI: 19 is where we have another dispute.

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[1]Jury Instruction 19 is reproduced in Appendix A. [See this Appendix C. 13-15]

THE COURT: No. 19 is a three-page instruction.

MR. JOELSON: Three-page instruction which really summarizes the entire theory of alter ego, I find. I have objections to No. 9, sir.

THE COURT: Paragraph 9?

MR. JOELSON: No. 9:

"The individual defendants owned, controlled, managed and dominated all the corporate defendants . . ."

THE COURT: Is that the only objection you have? Would you object to striking 9?

MR. PARISI: No, Judge, the reason being one of the elements which I have to prove is that there is such a unity of interest between the individual defendants and the corporation.

THE COURT: He treated this corporation as if it were an extension of his own being.

MR. PARISI: That's right. I don't mind giving an instruction that this fact alone in and of itself is not proof that he is liable. I think Mr. Joelson has prepared an instruction along those lines that will clarify it.

MR. JOELSON: Yes, I did.

THE COURT: All right, fine, then we will give it. That was my concern.

MR. JOELSON: Then may I take my instruction? My instruction is that in itself, alone, is not proof . . .

THE COURT: That will be given, and I will read it right after this instruction.

MR. JOELSON: Very well.

It is clear from this excerpt that defendants' attorney objected to paragraph 9 of instruction 19, proffered a "curative" instruction, [2] and after its

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[2]Defendants' curative instruction stated:

> You are further instructed that because one shareholder controlled and dominated the corporations and was the principal manager and the sole source of equity financing that, in and of itself, does not render him personally liable for debts of those corporations.

We note that the jury was further instructed that:

> Additional corporations will not lose their identities merely because the stockholders are identical and the corporations have the same officers and offices.
>
> Furthermore, the mere circumstance of common ownership in whole or in part does not create the relationship of principal and agent, representative or alter ego between the stockholder and the corporation.

acceptance made no further objection. Defense counsel did not suggest that the supplemental instruction could not remedy the alleged error(s) in instuction 19 nor did he request the deletion of any portion of that charge. On appeal, however, defendants argue that the supplemental instruction could only have confused the jury and that instruction 19 contains blatant misstatements of the law.

We do not find that the defense counsel's objection to instruction 19 was sufficient to preserve the issue for appeal under Rule 51. The purpose of that is to afford the trial judge an opportunity to correct potential errors in the jury instructions at a time when remedial action may be taken, see Hetzel v. Jewel Companies, 457 F.2d 527, 535 (7th Cir. 1972). In this case, defense counsel did not reiterate any objection to

instruction 19 after the court's acceptance of the additional instruction, either at the charge conference or subsequent to the reading of the charge to the jury. Thus, the trial court was not afforded an opportunity to correct any alleged deficiency in that jury instruction. The only exception to the rule requiring an explicit objection to a jury instruction is in situations where "the party's position has previously been cleary made to the court and it is plain that a further objection would be unavailing." 9 C Wright & A. Miller, Federal Practice and Procedure §2553 at 639-640 (1971) citing, inter alia, Mays v. Dealers Transit, Inc., 441 F.2d 1344 (7th Cir. 1971). This exception does not apply here because defense counsel's initial objection did not specify any alleged deficiency in instruction 19 which

would still be present after the inclusion of the supplemental instruction. Furthermore, the record does not reflect that such an objection would have been unavailing.

Having determined that no proper objection was made to Instruction No. 19, the only basis on which we can review the alleged error is under the plain error standard. In Shearson Hayden Stone, Inc. v. Leach, 583 F.2d 367, 370(7th Cir. 1978) this Court stated:

> Although this court has the power to reverse for plain error in an instruction to which no party specifically objected, this power is exercised in only very rare circumtances where necessary to prevent a miscarriage of justice. [citations omitted]

We do not find that this case justifies the exercise of that power. As noted by the trial judge after the jury's verdict, the case was not a close one:

> I think it was a fait accompli before the evidence was in. As I indicated to you, I would have no problem with this case. It would take me about thirty seconds to make oral findings of fact and conclusions of the law. The result is correct. Tr. p. 226

The evidence at trial revealed a classic example of asset-stripping by the Albanos and circumstances which clearly warranted the piercing of the corporate veil. The defendants did not contest the occurrence of the relevant transactions but merely attempted to justify them.

At the relevant time periods, Frank Albano was president and sole stockholder of CCS and CCSDI. The Albanos were also the original incorporators of CCSO and its sole stockholders.[3] There was ample evidence that the various corporations

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[3]At one time Nicholas Moraitis owned some of the stock of CCSO. However, he never paid any money for those shares and subsequently assigned them to Frank Albano, tr. p. 53.

paid each other's debts and employees, tr. pp. 66-77, 80-92. It was undisputed that Frank Albano made the decision to have CCSDI loan him $25,000.00 at a very low interest rate (7 1/2%) and that he used that money to buy real estate which he then charged CCS, CCSDI, and CCSO rent for occupying, tr. pp. 92-99. This loan was subsequenty forgiven by the corporation, tr. p. 97.

It was undisputed that Frank Albano made the decision to transfer the inventory of CCS to CCSDI, tr. p. 44. He admitted that the inventory was the bulk of the assets of CCS, tr. p. 45. He testified at his deposition that CCS was in financial difficulty and that after the transfer of assets CCS was essentially insolvent. This testimony was submitted into evidence, tr. pp. 99-100, 181-182. At trial, the underlying debt was not

contested, and this, in conjunction with the fact that CCS had no means of generating funds (its retail operations having been taken over by other corporations operated by Frank Albano) created a rather clear inference that CCS was no longer a viable corporation.

Frank Albano admitted that he made the decision not to transfer the liabilty of Clarion or its inventory from CCS to CCSDI, tr. p. 47. His explanation for this decision was disingenuous:

> Because the inventory along with liability was in litigation at the time, and that the outcome of it would have been determined, you know, by court of law, and it was hard to put a dollar amount on how to transfer such a complicated liablility and asset situation to a new corporation. It wouldn't be fair for the new corporation to assume it.

We note that CCS eventually defaultd on its debt to Clarion and abandoned its counterclaim.

Appellants' counsel vigorously argues that asset-stripping did not occur, stressing the fact that Clarion's inventory at CCS was not transferred. If this was an in rem action involving that inventory or an action by Clarion to rescind the contract(s) of sale this argument might have some merit. But this case was based on a monetary obligation owed to the plaintiff by CCS, and after the transfer by CCS's assets and the takeover of its retail operations it is clear that CCS was unable to satisfy the debt.

Therefore, we find that under either Illinois law, see Macaluso v. Jenkins, 95 Ill. App.3d 461, 420 N.E.2d 251 (198), or the standards of this circuit, see Steven v. Roscoe Turner Aeronautical Corp., 324 F.2d 157 (7th Cir. 1963), the evidence overwhelmingly supported the jury's

decision to pierce the corporate veil.[4] The appellants' concern that, under jury instruction 19, the jury could have based its verdict on a finding that the corporate defendants failed to maintain adequate records or that the different corporations were treated as different parts of one operation seems very unlikely in view of the nature of the evidence in

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[4] The language of jury instruction 19 was taken almost verbatim from the Macaluso case, and defense counsel made no objection to that choice of Illinois law. However, on appeal, appellants argue that the standard for piercing the corporate veil set forth in Steven apply to this case. Based on our analysis of this case, we need not decide which test should be applied for purposes of appellate review since the result would be the same under either one.

this case. [5] Accordingly, we do not find that the circumstances of this case warrant reversal under the plain error doctrine. Furthermore, we reject appellants' contention that there was insufficient evidence to support the jury's verdict.

The judgment of the district court is hereby affirmed.[6]

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[5] We note that the possibility that the jury's decision was based on improper factors was limited by the supplemental instructions, see fn. 2 supra.

[6] While we reject appellants' arguments, we do not conclude that the appeal was frivolous and therefore we decline to award attoneys' fees or double costs to appellee pursuant to Fed.R.Ap.Proc. 38.

JURY INSTRUCTION NO. 19

The Plaintiff's corporate instrumentality claim against Custom Car Stereo Distributing of Ilinois, Custom Car Stereo of Oak Lawn, Frank Albano and Judy Albano has two essential elements, as follows:

First, that there exists such a unity of interest and ownership of the corporate defendants and individual defendants that the separate personality of the corporation or corporations and/or the individuals did not exist or no longer exists and

Second, that circumstances exist which would allow the adherence to the fiction of separate corporate existence to sanction a fraud or promote injustice.

These elements may be established if you find that any one or more of the following facts exist:

1.) Funds or assets of any defendant were transferred to other defendants for the purpose of depriving plaintiff of recovery of its claim;

2.) The defendants commingled assets, funds, properties, or other monies of the defendant Custom Car Stereo, Inc. among the various corporate defendants and individual defendants;

3.) The corporate defendants failed to maintain adeuqate corporate records or to comply with corporate formalities;

4.) Custom Car Stereo, Inc. was rendered insolvent by the manipulation of assets and liabilities so as to concentrate assets in Custom Car Stereo Distributing of Illinois and the liabilitiee in Custom Car Stereo, Inc.,;

5.) Treatment by an individual of the assets of the corporatoin as his own;

6.) Failure to maintain arm's length relationship among related liabilities;

7.) Inadequate capitalization of corporate entities, i.e., the corporation did not have sufficient assets to conduct its business in a financially responsible manner;

8.) That the various corporate defendants were treated as different parts of one operation;

9.) That the individual defendants owned, controlled, managed, and dominated all of the corporate defendants, Custom Car Stereo, Inc., Custom Car Stereo Distributing of Illinois, and Custom Car Stereo of Oak Lawn as part of a common business enterprise.

If you find that the plaintiff has established the two elements of its proof by a preponderance of the evidence by proving any one or more of the facts set forth in paragraphs (1) - (9), then you should return a verdict for the plaintiff and against the defendants, Frank Albano and Jacqueline Albano. You need not consider the issues as they apply to the corporate defendants since default judgment has been previously entered against them. If on the other hand you find that plaintiff has failed to establish the two elements set forth above, then you should return a judgment in favor of the defendants.

85-746

Supreme Court, U.S.
FILED
FEB 3 1986
JOSEPH F. SPANIOL
CLERK

No. A-105

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

FRANK ALBANO and JACQUELINE ALBANO,

Petitioners,

vs.

CRAIG CORPORATION,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the trial court properly determined that the doctrine of collateral estoppel applied in the present cause where the pleadings, evidence, jury instructions and judgment indicate that the Albanos' personal liability for the debts of the defendant corporations was established in the earlier Clarion trial.

TABLE OF CONTENTS

PAGE

Table of Cases..... v.

Statement of the Case..... 1

A. Procedural History of the Present Cause..... 1

B. The Albanos' Ownership, Control and Mismanagement of the Defendant Corporations.... 7

C. The Clarion Litigation..... 11

D. The Waiver Defense Presented By The Albanos at Trial..... 14

Summary of Argument..... 16

Argument..... 18

A. The Trial Court Properly Applied The Doctrine of Collateral Estoppel to Prevent the Albanos from Re-Litigating Issues Determined in the Earlier Clarion Trial..... 19

1. The Standard for Application of the Doctrine of Collateral Estoppel..... 19

2. The Same Issue was Decided Adversely to the Albanos

in the Clarion Case as was Presented in the Present Cause..... 21

B. During the Time the Plaintiff Dealt with the Defendant Corporations It Had No Knowledge of the Albanos Mismanagement of Those Corporations and Thus Could Not Have Waived Any Right Against the Albanos..... 30

Conclusion..... 38

TABLE OF CASES

Buffum v. Chase National Bank of City of New York, 192 F.2d 58 (7th Cir. 1951)..... 31, 32

Continental Can Company, U.S.A. v. Marshall, 603 F.2d 590 (7th Cir. 1979)..... 28, 29

Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962)..... 22, 23

Garfinkle, Matter of, 672 F.2d 1340 (11th Cir. 1982)..... 31, 33

Kurek v. Pleasure Driveway, 583 F.2d 378 (7th Cir. 1978).. 20, 21, 27

Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 99 S.Ct. 645 (1979)..... 20

People v. Godden, 56 Ill.App.3d 408, 371 N.E.2d 1089 (1977)..... 32

Perlman v. First National Bank of Chicago, 15 Ill.App.3d 784, 305 N.E.2d 236 (1978)..... 31

Shearsen Hayden Stone, Inc. v. Leach, 583 F.2d 367 (7th Cir. 1978). 31

Universal Gas Co. v. Central Illinois Public Service Co., 102 F.2d 164 (7th Cir. 1939)..... 32

Wetherill v. University of Chicago,
548 F.Supp 66 (N.D. Ill. 1982)..... 19

Whitley v. Seidel, 676 F.2d 245
(7th Cir. 1982)..... 20

Williams v. Liberty, 461 F.2d
325 (7th Cir. 1972)..... 27

STATEMENT OF THE CASE

A.
PROCEDURAL HISTORY OF THE PRESENT CAUSE

Count I of the plaintiff's two-count Complaint alleges a breach of contract by the defendant, Custom Car Stereo,Inc. (hereinafter refered to as "CCS"), for its failure to pay for goods sold and delivered by plaintiff between February 10, 1981, and June 10, 1981. Count II of the complaint is based on an alter ego theory of liability and names as defendants CCS, Custom Car Stero Distributing of Illinois, Inc. (hereinafter referred to as "Distributors"), Custom Car Stereo of Oak Lawn, Inc. (hereinafter referred to as "Oak Lawn"), Frank Albano and Jacqueline Albano. Count II alleges, inter alia, that the Albanos controlled the corporate

defendants, treated the corporate defendants as a single entity, stripped the assets of the corporate defendants and organized the corporate defendants for the purpose of defrauding their creditors. (R. 1)

On July 14, 1982, a default judgment was entered in favor of the plaintiff and against CCS, Distributors and Oak Lawn in the sum of $77,786.78. (R. 25) Thereafter, the plaintiff presented its Motion For Summary Judgment on Count II of the complaint against Frank Albano and Jacqueline Albano. (R. 67) The basis of the summary judgment motion was that as a result of an earlier judgment the Albanos were estopped from denying personal liability for the debts of the corporate defendants. (R. 67 & 68)

The trial court denied the Motion for Summary Judgment and indicated that, while the defendants were estopped from denying certain matters, a fact question existed based on the Albanos' affirmative defense of waiver. (R. 90)

Pursuant to the plaintiff's subsequent motion, the trial court entered an Order which limited the issues at trial. (R. 113) The court found that:

> The doctrine of collateral estoppel is applicable in this case. Defendants are estopped from relitigating the question of whether or not they operated the corporate entities as their alter ego so as to warrant the piercing of the corporate veil or veils existing between them and the plaintiff. This issue is the same as was decided in the Clarion case. The issue was litigated in that action, and the judgment entered was dependent upon the determination of that issue. It is not open for

redetermination in this case.

(R. 113)

Accordingly, the trial court ordered that the trial would proceed on the sole issue of whether the plaintiff waived its right to proceed against the Albanos. (R. 113)

The trial of this cause commenced on February 6, 1984. At that time the trial judge ruled that he would not instruct the jury as to any wrongdoing on the part of the Albanos because this might cause them prejudice. (Tr. 4) The court also determined that the plaintiff could not put on any evidence of the Albano's wrongdoing unless the Albanos were to first "open the door" for this testimony. (Tr. 4)

During the Albanos' case in chief Mr. Albano testifed over the plaintiff's objection that he established

Distributors for a legitimate purpose. (Tr. 212-217) Mr. Albano further testified that he would have returned the plaintiff's merchandise upon request, that the plaintiff was fully informed of the Clarion case, knew the details of Mr. Albano's management of the corporate defendants, was provided all information regarding the financial condition of the corporate defendants, was fully provided with accurate records by Mr. Albano whenever he was requested to provide this information, and that the Clarion case arose due to a legitimate dispute between the parties. (Tr. 211-212, 220-221, 226, 238) After hearing this testimony the trial judge held that the plaintiff was still barred from presenting any evidence of the Albanos' wrongdoing. (Tr. 293)

On February 8, 1984, the jury

returned a verdict in favor of the plaintiff and against the Albanos. (R.134) In answer to Special Interrogatories the jury returned a verdict that the plaintiff did not waive its right to proceed against the Albanos personally. (R. 131) The trial court entered judgment in favor of the plaintiff and against the Albanos in the sum of $85,141.03. The amount of the judgment included interest from the date judgment was entered against the corporate defendants. (R. 135)

The Albano's motions for a new trial and for judgment notwithstanding the verdict were denied and they then file their Notice of Appeal the the United States Court of Appeals for the Seventh Circuit. (R. 148) On May 13, 1985, the judgment against the Albanos was

affirmed in the Seventh Circuit. (Appendix A)

B.

THE ALBANOS' OWNERSHIP, CONTROL AND MISMANAGEMENT OF THE DEFENDANT CORPORATIONS

From 1976 until May 14, 1981, the defendant, Frank Albano, was the sole shareholder, director and officer of CCS. (Rec. 88, at T.30) CCS was engaged in the business of selling and installing car stereos. (Rec. 88, at T. 27) Prior to the trial of this cause, Mr. Albano testified that the office of CCS was located at 9736 Southwest Highway, Oak Lawn. (Rec. 88, at T. 60-61, 78) At the trial of this cause Mr. Albano testified that the office of CCS was located at 9749 Southwest Highway. (Tr. 210)

On June 30, 1980, Mr. Albano incorporated Distributors. (Rec. 88, at T. 38) Mr. Albano was the sole

incorporator, shareholder and director of Distributors, and was also Distributors' President and Treasurer. (Rec. 88, at T. 31, 38) Mr. Albano's wife, Jacqueline Albano, was the Vice-President and Secretary of Distributors. (Rec. 88, at T. 31) The initial capitalization of Distributors was $1,000. (Rec. 88, at T. 38)

Distributors was engaged in the same business as CCS and purchased from the same suppliers. (Rec. 88, at T. 27) Distributors shared office space with CCS at 9736 Southwest Highway, Oak Lawn. (Rec. 88, at T. 60-61, 78)

On July 8, 1980, Mr. Albano incorporated Oak Lawn. (Rec. 88, at T. 31, 38) Mr. Albano was also a director and officer of Oak Lawn. (Rec. 88, at T. 31, 38) Oak Lawn shared office space

with CCS and Distributors at 9736 Southwest Highway, Oak Lawn. (Rec. 88, at T. 60-61, 78) Oak Lawn took over the selling operations of CCS. (Rec. 88, at T. 31, 48)

In addition to sharing office space, the corporate records and checkbooks of CCS, Distributors and Oak Lawn were kept together. (Rec. 88, at T. 60-61, 78) Distributors paid the rent for CCS and Oak Lawn. (Rec. 88, at T. 61) Distributors also paid a debt of CCS to William H. Caldwell, Sr. for the purchase of stock in CCS, for a van owned by CCS, for a car owned by CCS and/or Frank Albano and for a Lincoln Mark IV automobile owned by CCS. (Rec. 88, at T. 66-77, 80-88) In addition, Distributors gave Christmas bonuses to employees of the other various Custom Car Corporations

who never worked for Distributors. (Rec. 88, at T. 89-91).

In late 1980 or early 1981, Distributors made a $25,000 personal loan to Mr. Albano. The loan was at 2% below prime and was made without Mr. Albano pledging any collateral. The decision on behalf of Distributors to loan the money was made by Mr. Albano. The proceeds of the loan were used to purchase the property upon which the corporations were located. Mr. Albano, after using the $25,000 as the initial down payment on the property, charged rent to Distributors. Mr. Albano could not recall paying interest on the note as it was due every 90 days. The loan was subsequently forgiven and was never repaid by Mr. Albano. (Rec. 88, at T. 92-98)

On May 14, 1981, Mr. Albano sold

his interest in CCS, Distributors and Oak Lawn to third parties. In exchange, Mr. Albano was given $100,000 of the inventory of Distributors, forgiveness of the $25,000 loan from Distributors and a $30,000 promissory note from the purchasers. No consideration was paid to Distributors. (Rec. 88, at T. 124-132)

Mr. Albano then opened Dashboard, Ltd. at the same location where Distributors had been doing business. Dashboard began operating with the same inventory that had previously belonged to Distributors. One of the conditions of the sale of Distributors was that it would move out of the premises. (Rec. 88, at T. 183-186)

C.
THE CLARION LITIGATION

On May 28, 1980, Clarion

Corporation of America filed suit in the United States District Court for the Northern District of Illinois, to recover for monies due from CCS. Count I of Clarion's two-count Amended Complaint alleged breach of contract by CCS. Count II of the Amended Complaint was based on an alter ego theory of liability and named CCS, Distributors, Oak Lawn, Frank Albano and Jacqueline Albano as defendants. Count II alleged, inter alia, that the Albanos controlled the corporate defendants, treated the corporate defendants as a single entity, stripped the assets of the corporate defendants and organized the corporate defendants for the purpose of defrauding their creditors. (Rec. 88, Ex. "1")

The Clarion case was tried to a jury on August 21, 1981, at which time a

verdict was returned in favor of the plaintiff and against CCS, Distributors, Oak Lawn, Frank Albano and Jacqueline Albano in the amount of $46,242.51. The trial court entered judgment on the verdict after stating that:

> I think it was fait accompli before the evidence was in. As I indicated to you, I would have no problem with this case. It would take me about thirty seconds to make oral findings of fact and conclusions of law. The result was correct.

(Rec. 88, at T. 226)

Frank Albano and Jacqueline Albano subsequently appealed from the judgment entered in the District Court. On December 13, 1982, the United States Court of Appeals for the Seventh Circuit affirmed the judgment. In affirming, the Court stated:

The evidence at trial revealed

> a classic example of asset stripping by the Albanos and circumstances which clearly warranted the piercing of the corporate veil.

(Appendix A, p.8)

D.
THE WAIVER DEFENSE PRESENTED BY THE ALBANOS AT TRIAL

Rocco Rotollo, the plaintiff's sales manager, testified that he was aware of the establishment of Distributors during or about July of 1980. (Tr. 105) Mr. Rotollo was told at that time that Distributors was set up for the purpose of easing distribution problems Mr. Albano was having with his corporations. (Tr. 212) Mr. Rotollo was assured that the establishment of Distributors would not affect the relationship between plaintiff and the Albanos. (Tr. 41) Craig then changed their invoices and began dealing with

Distributors.

On May 14, 1981, Mr. Albano sold his shares in the defendant corporations to William Boris and William Caldwell. (Tr. 227) The plaintiff was not informed of the sale until after it had occurred. (Tr. 48, 50, 108, 111) The purchasers of the corporations were former employees. (Tr. 47-48) The plaintiff refused to extend any credit to the defendant corporations after this transfer took place. (Tr. 51-52, 114) Thereafter, the only transactions with the defendant corporations were to credit their accounts pursuant to promotional agreements made prior to the sale and for the return of defective merchandise, thereby reducing the amount of money owed to the plaintiff, and also cash sales of parts needed for repairs. (Tr. 51-52,

73-74, 114) The plaintiff unsucessfully attempted to have the defendant corporations pay the outstanding debt. (Tr. 51)

During the time the Albanos were setting up Distributors and Oak Lawn, they were also involved in litigation with Clarion Corporation of America. (Tr. 264) Mr. Albano claimed to have discussed the Clarion litigation with the plaintiff's representatives. (Tr. 272-273) The Albanos admitted that they never indicated to the plaintiff that they were personally liable for the debts of the defendant corporations or that there was any liability to Clarion. (Tr. 263, 264, 277, 316-317)

SUMMARY OF ARGUMENT

The Clarion litigation involved a count for breach of contract against CCS

and a count based on an alter ego theory of liability naming all corporate defendants and the Albanos. The judgment in Clarion pierced the corporate veil of all the corporate defendants and held the Albanos personally liable for the debts of the corporations.

The trial court in the present cause reviewed the pleadings, evidence and jury instructions from Clarion. The pleadings and jury instructions dealt with piercing the corporate veil of Distributors. Evidence was presented which overwhelmingly established asset stripping and mismanagement of Distributors. Judgment was entered against the Albanos and all the corporate defendants, including Distributors. Based on the foregoing facts the trial court properly held that the Albanos were

estopped from denying personal liability for the debts of Distributors.

ARGUMENT

The Albanos assert that the judgment entered below should be reviewed because the lower courts improperly and unfairly applied the doctrine of collateral estoppel by barring the Albanos from relitigating the issue of their liability for the debts of the corporate defendants. As will be shown, the applicable case law dictated that the trial court apply the collateral estoppel doctrine to bar the Albanos from relitigating the issues determined in Clarion and the Court fairly applied the doctrine by granting every benefit of the doubt to the Albanos in its rulings relating to the conduct of the trial.

A.
THE TRIAL COURT PROPERLY APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL TO PREVENT THE ALBANOS FROM RE-LITIGATING ISSUES DETERMINED IN THE EARLIER CLARION TRIAL

Illinois law on the doctrine of collateral estoppel applies in federal court diversity cases. Wetherill v. University of Chicago, 548 F.Supp. 66,68 (N.D. Ill. 1982). The Illinois requirements for application of collateral estoppel are the same as under federal law. Id.

1. The Standard For Application of the Doctrine of Collateral Estoppel

The doctrine of collateral estoppel applies where the following four-part test is met:

> Whether the issue sought to be concluded is the same as that involved in the prior action; was litigated in the prior action; was in fact judicially determined in the prior action; and whether the judgment in the prior action was dependent upon

the determination.

Whitley v. Seidel, 676 F.2d 245, 248 (7th Cir. 1982), 1B Moore's Federal Practice, Sec. 0.443(1) (1982). Additionally, it is no longer required that "mutuality of estoppel" exist, and the doctrine can be asserted offensively by a new plaintiff against a defendant who was a party in the previous litigation. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 8 L.Ed2d 552 (1979), Whitley v. Seidel, 676 F.2d 245, 248 (7th Cir. 1982).

When determining whether the same issue was determined in the prior proceeding, it is not sufficient to merely look to the appellate court opinion from the prior proceeding. Kurek v. Pleasure Driveway, 583 F.2d 378, 380 (7th Cir. 1978). Rather, the judgment

entered in the prior proceeding must be construed along with the facts elicited in that proceeding to determine whether estoppel applies. Id.

2. The Same Issue Was Decided Adversely To The Albanos In The Clarion Case As Was Presented In The Present Cause.

The Albanos assert, without reference to the Clarion record or judgment, that in the Clarion case the financial condition of Distributors, asset stripping from Distributors and whether to pierce the corporate veil of Distributors was not in issue. Rather, the Albanos would have this Court believe that the evidence presented in the earlier proceeding dealt primarily with asset stripping from CCS.

The facts elicited at the Clarion trial, however, established that the Albanos defrauded their creditors both in

June and July of 1980 when Distributors and Oak Lawn were established and when Distributors was stripped of its assets during its operation and through its sale on May 14, 1981. A review of the facts and judgment entered in the Clarion case, indisputably establishes that the same facts were determined in the earlier proceeding as the plaintiff would have had to prove in the present cause. These facts, which all involve stripping of the assets of Distributors and mismanagement of Distributors, include the following:

> a. That CCS and Distributors were both in the business of selling and installing car stereos, and both businesses purchased from the same suppliers. (Rec. 88, at T. 27)
>
> b. That Frank Albano sold his interest in CCS, Distributors and Oak Lawn on May 14, 1981. (Rec. 88, at T. 29)
>
> c. That Frank Albano was the

sole shareholder, director and officer of CCS. (Rec. 88, at T. 30)

d. That Frank Albano was the sole incorporator, shareholder and director of Distributors, and was also President and Treasurer. Jacqueline Albano was the Vice-President and Secretary of Distributors. The initial capitalization of Distributors was $1,000. (Rec. 88, at T. 31, 38)

e. That on or about July 8, 1980, Frank Albano incorporated Oak Lawn, which took over the operations of CCS at 9732 Southwest Highway, Oak Lawn. Frank Albano was the sole offficer and shareholder. (Rec. 88, at T. 31, 48)

f. That Frank Albano controlled six corporations, all of which were involved in the same type of business. (Rec. 88, at T. 48)

g. That CCS, Distributors and Oak Lawn all shared office space at 9736 Southwest Highway, Oak Lawn, and kept all of their checkbooks and corporate records together at that location. Distributors paid the rent for CCS and Oak Lawn. (Rec. 88, at T. 60-61, 78)

h. That Distributors paid for debts incurred by CCS, such as CCS' agreement to purchase its own stock from William H. Caldwell, Sr. Distributors also paid for a van owned by CCS, for a car owned by CCS and/or Frank Albano and for a Lincoln Mark IV automobile owned by CCS. (Rec. 88, at T. 66-69, 70-77, 80-88)

i. That Distributors gave Christmas bonuses to employees of the other various Custom Car Corporations who never worked for Distributors. (Rec. 88, at T. 89-91)

j. That in late 1980 or early 1981, Distributors made a $25,000 personal loan to Frank Albano. The loan was at 2% below prime and was made without Mr. Albano posting any collateral. The decision on behalf of Distributors to loan the money was made by Frank Albano. The proceeds of the loan were used to purchase the property which the corporations were located upon. Mr. Albano then began to charge Distributors rent. Mr. Albano could not recall paying interest as it became due every 90 days. The loan was subsequently forgiven and was never repaid by Mr. Albano.

(Rec. 88, at T. 92-98)

k. That the Albanos failed to follow corporate formalities while they were controlling the various corporations. (Rec. 88, at 112, 116-118, 121-124)

l. That on May 14, 1981, Frank Albano sold his interest in Distributors to third parties. In exchange, Mr. Albano was given $100,000 of the inventory of Distributors, forgiveness of the $25,000 loan from Distributors, and a $30,000 promissory note from the purchasers. Although the inventory of Distributors was sold, no consideration was paid to Distributors. (Rec. 88, at T. 124-132)

m. That Frank Albano then opened an entity known as Dashboard, Ltd., at the same location where Distributors had been doing business. Dashboard, which was involved in the same type of business, began operating with the same inventory that had previously belonged to Distributors. (Rec. 88, at T. 183-186)

The facts set forth above are precisely the same facts that the plaintiff in the present cause would have

to establish to prevail on its action against the Albanos. These facts clearly establish that throughout 1980 and until May 14, 1981, the Albanos mismanaged and stripped the assets of the corporations they controlled, including Distributors. It was during this same time period that the obligation to the plaintiff in the present cause was incurred. Based on these facts, and the judgment entered in the Clarion case, it is clear that the Albanos personal liability for the debts of Distributors has already been established. To hold otherwise would cause the plaintiff to present the same evidence relating to the precise issue determined in the Clarion case.

The appellate opinion from Clarion is not determinative of whether the same issue was litigated in the Clarion trial.

Kurek v. Pleasure Driveway, 583 F.2d 378, 380 (7th Cir. 1978). Rather, "it is the judgment, properly construed in the light of pertinent facts, that creates the potential for collateral estoppel..." Id. Where, as here, the general verdict does not recite what matters were determined in the earlier suit, it is for the trial judge to ascertain what issues were previously determined by examining the earlier record, including the pleadings, the evidence and the jury instructions. Williams v. Liberty, 461 F.2d 325 (7th Cir. 1972). citing 340 U.S. 568-569.

The pleadings in Clarion place the Albanos' mismangement of Distributors in issue and seek to pierce the corporate veil of Distributors (Rec. 88, Ex. "1") The Facts adduced during the Clarion trial, as set forth above, provide

evidence of asset stripping and mismanagement of Distributors more than sufficient to compel the Clarion jury to pierce the coporate veil of Distributors. Significantly, the jury instructions asked to pierce the corporate veil of all three corporate defendants. (Rec. 88, at "Clarion Brief", p.p. 19-20) Judgment was entered against the three corporate defendants, including Distributors.

The Albanos cannot avoid the collateral estoppel effect of Clarion by claiming that a point which was placed in issue and which supports that judgment was irrelevant to the determination of that case. Continental Can Company, U.S.A. v. Marshall, 603 F.2d 590, 595-596 (7th Cir. 1979). Rather, if the parties disputed an issue which was then resolved by the trier of fact, collateral estoppel

applies. Id.

Additionally, the Albanos claim in this regard is based on the fact that the remaining unpaid invoices were originally addressed to Distributors. The plaintiff, however, originally invoiced CCS. (Tr. 151-155) This procedure was changed in mid-1980 at the request of Mr. Albano. The stated reason for this change was merely to simplify the Albanos' distribution procedures. (Tr. 41) The plaintiff was assured that this change was in form only and would not effect the nature of the relationship between the parties. (Tr. 41) The plaintiff then continued to ship the same products without delay to the same locations. (Tr. 45)

The Albanos now seek, as they did during the Clarion trial, to assert the

separate corporate identities between CCS and Distributors. This is a distinction which the Albanos did not adhere to while they operated the Custom Car corporations and which was conclusively discarded by the Clarion judgment.

Furthermore, the plaintiff in this cause is suing on invoices dated between December 16, 1980, and April 9, 1981. This involves the same time frame as the facts elicited at the Clarion trial. These facts established the Albanos liability for the debts of the corporate defendants and they apply with the same force and effect to establish liability to every creditor of the corporations in existence during this time period, including the plaintiff in this cause.

B.

DURING THE TIME THE PLAINTIFF DEALT

WITH THE DEFENDANT CORPORATIONS IT HAD NO KNOWLEDGE OF THE ALBANOS' MISMANAGEMENT OF THOSE CORPORATIONS AND THUS COULD NOT HAVE WAIVED ANY RIGHT AGAINST THE ALBANOS

Waiver is a voluntary and intentional relinquishment or abandonment of a known existing right or privilege which, except for waiver, would have been enjoyed. Shearsen Hayden Stone, Inc. v. Leach, 583 F.2d 367 (7th Cir. 1978), Buffum v. Chase National Bank of City of New York, 192 F.2d 58 (7th Cir. 1951). Perlman v. First National Bank of Chicago, 15 Ill.App.3d 784, 305 N.E.2d 236 (1978). The waiver may be express or implied from conduct. Matter of Garfinkle, 672 F.2d 1340 (11th Cir. 1982), Buffum v. Chase National Bank of City of New York, supra. There can be no waiver unless it plainly appears that the party has acted with full knowledge of

the right which has allegedly been waived. Universal Gas Co. v. Central Illinois Public Service Co., 102 F.2d 164 (7th Cir. 1939). "Courts should indulge every reasonable presumption against waiver... (citation omitted) The intention to relinquish the known right must be 'proven by clear, precise, and unequivocal evidence,' and the burden of proof is upon the party claiming waiver." People v. Godden, 56 Ill.App.3d 408, 371 N.E. 2d 1089, 1093 (1977). Where, as here, "the only proof of an intention to waive rests on what a party does or forebears to do, his act or omissions to act should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible." Buffum v.

Chase National Bank of City of New York, 192 F.2d 58 (7th Cir. 1951). Waiver does not arise from a forebearance to act for a reasonable time. Matter of Garfinkle, 672 F.2d 1340, 1347 (11th Cir. 1982).

The Albanos' waiver defense was based on the following facts: 1) that the plaintiff knew of the changeover from CCS to Distributors and made no objection to this change; 2) that the plaintiff knew of the subsequent sale of the Distributors stock to third persons and did nothing to prevent the sale; and 3) that the plaintiff attempted to collect the debt it was owed from the corporations which had incurred the debt.

Since the plaintiff was dealing with corporate entities the changeover from CCS to Distributors and the subsequent sale of the Distributors

stock, if legitimate transactions, would not have created personal liability on the Albanos. Frank Albano admitted telling the plaintiff's agents that Distributors was established for a legitimate business purpose, i.e. to act as a central distributor for the Albanos. (Tr. 218) Mr. Albano persists in his claim that Distributors was established for a proper purpose. (Tr. 283) Similarly, if the sale of the Distributors stock was properly conducted, the plaintiff would have no standing to object to the sale and there would not have been the resulting liability on the Albanos.

Nowhere in the record do the Albanos claim to have informed any agent of the plaintiff that the assets of the defendant corporations had been stripped,

that the various corporations had paid each others debts, that the corporate formalities had not been followed or of the various other acts of mismanagement. Without this knowledge, the plaintiff could not have known of any right to collect the outstanding debt personally from the Albanos. Since the plaintiff did not know of any right to proceed against the Albanos, there could not have been a knowing waiver of such right.

Even if the Albanos could establish full knowledge on the part of the plaintiff, an implied waiver would not have existed. The sale of Distributors occurred on May 14, 1981. (Tr. 227) This cause was commenced against the Albanos on September 1, 1981. In the interim, the plaintiff attempted to collect the debt it was owed from the

corporations which had incurred the debt. (Tr. 52-53) This was a reasonable business decision which would have been made by any other party in the same situation.

After the sale of Distributors, the plaintiff refused to do business with the Albanos or their new entity, Dashboard, Ltd. (Tr. 115-116) The plaintiff also refused to extend any further credit to the corporations until the existing indebtedness had been paid. (Tr. 51-52, 114)

The Albanos emphasized the fact at trial that the plaintiff knew of the Clarion litigation. Mr. Albano admitted, however, that the plaintiff was told that there was no wrongdoing in the management of the companies. (Tr. 277) The fact of the Albanos mismanagement of the

corporations did not come to light until the Clarion judgment was entered against the Albanos on August 25, 1981. (Rec. 68, Ex. "1") Within 2 weeks of the Clarion judgment the plaintiff's Complaint was on file. (Rec. 1)

In sum, the Albanos were free to inform the jury of the wrongdoing which led to the corporate veil being pierced and to present any evidence they had which would indicate that the plaintiff knew of their wrongdoing. The Albanos chose not to proceed in this manner. The trial judge prevented the plaintiff from informing the jury of the Albanos' wrongful acts. The jury obviously saw through the Albanos' illusory defense and quickly rejected their waiver theory.

CONCLUSION

For the foregoing reasons Craig Corporation respectfully requests that this Court deny the Petition for Writ of Certiorari heretofore filed by Frank Albano and Jacquline Albano.

Respectfully submitted,

Craig Corporation,

by:_____
one of its attorneys

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